

The Israeli Override Clause and the Future of Israeli Democracy

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The recent proposals to enact an override clause to the Israeli Basic Law: Human Dignity and Liberty has triggered a fierce public debate in Israeli legal and political circles. Under this proposal, the *Knesset* could reenact a statute that was declared void by the courts. As is characteristic of such debates, the proponents and opponents of the override clause claim to defend democracy, strengthen the protection of rights and defend restore the proper balance between different branches of government. The purpose of this post is to explain the background of this debate and evaluate the pros and cons of the override clause in the Israeli context. Unfortunately for the reader, the author is not a neutral observer of this debate. He clearly and unambiguously sides with the opponents of this clause and yet, I hope to present a fair and a balanced description of the controversy.

The first section provides a background for the debate. The second section describes the history of the debate and the political context in which it is conducted and the third section examines the pros and cons of the override clause.

The Basic Laws of Israel and its Constitutional Foundations

Israel has no written constitution. Despite numerous efforts to enact a written constitution, no such constitution has been enacted. Yet during its history several 'basic laws' have been enacted. Most of the basic laws are designed to specify the institutional structure of the state and the powers of the different branches of government. Only in 1992 the Israeli *Knesset* passed two basic laws designed to protect rights: Basic law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.¹⁾The full text of all Israeli basic laws can be found [here](#)

The passing of these two basic laws has been regarded by some as a dramatic legal event – a radical transformation of the legal foundations of Israel and is therefore described as a 'constitutional revolution.' This term is used for two reasons. First, Basic Law: Human Dignity and Liberty includes broad provisions protecting 'life body and dignity' in sections 2 and 4, property in section 3 and privacy and intimacy in section 7(a).²⁾Note however that this Basic Law does not protect (or at least does not explicitly protects) some rights which are almost universally protected in bills of rights such as freedom of expression, freedom of religion, equality etc. Second, section 8 to the Basic Law declares that: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." Hence this basic law explicitly recognized that its provisions bind the *Knesset* itself and can be construed to establish for the first time in Israel rights-based judicial review. The basic law was passed by the *Knesset* in a regular non-ceremonial legislative process. It was supported by thirty two *Knesset* members (out of a hundred and twenty), opposed by twenty one and one *Knesset* member abstained.

For reasons too peculiar to explain to a foreign reader, in 1994 Basic Law: Freedom of Occupation was amended, and an override clause was added to it, but no such clause was added to Basic Law: Human Dignity and Liberty. In the same year, in one of the lengthiest judgments ever made by the Court (which is not known for the brevity of its judgments), the Court decided in *United Mizrahi Bank v. Migdal Cooperative Village* that Basic Law: Human Dignity and Liberty grants the courts the power of judicial review. Statutes that conflict with this basic law should be declared void by the courts. The decision has been compared to the famous US *Marbury v. Madison* decision in which the US Supreme Court declared that it has the power to declare statutes void.

The growing power of the Israeli Supreme Court especially under the leadership of the charismatic leadership of its former President Justice Aharon Barak and its alleged 'activism' raised hostile reactions on the part of certain segments of the public. The enactment of the basic laws was only one reason for this opposition. In addition the Court eroded the requirement of standing and used often non-literal interpretation designed to protect basic human rights. The willingness of the Court to protect rights of ethnic minorities, women and gays has been depicted as sectarian, leftist and anti-religious. The opposition to the growing power of the Court was not limited to right-wing political activists. Although generally the legal community has been sympathetic to the 'constitutional revolution', prominent legal academics (e.g., professors Ruth Gavison and Daniel Friedman) expressed reservations concerning the powers of the courts on the grounds that judicial review is anti-democratic; that the Knesset had no power to enact constitutional provisions, and that the process by which the basic laws have been enacted is not appropriate to the enactment of foundational constitutional provisions as no public debate preceded the enactment of the two basic laws and only a minority of Knesset members supported these laws.

The Override Debate

Numerous legislative initiatives designed to limit the powers of the Court took place in the last twenty years. In recent years the main efforts have been made to enact an override clause to the Basic Law: Human Dignity and Liberty. The primary advocates of these proposals have been members of the *Likud*, the Jewish Home party (a rightwing nationalist-religious party) and the ultra-orthodox parties. In 2014 the Supreme Court declared that a statute empowering the government to send asylum seekers to detention centers is unconstitutional. As a result a prominent member of the Jewish Home party MK Ayelet Shaked submitted a proposal for an override clause which was approved by the former government but never submitted to the *Knesset*. Under this proposal, after the Court declares that a statute is void the *Knesset* could, if it wishes to do so, reenact the statute if it is supported by a simple majority of the all *Knesset* members.

The political pressure to enact an override clause led the Jewish Home party to include this issue in the coalitional agreement with the Likud. This agreement specified that the Likud and the Jewish Home Party will support the enactment of an override clause. Yet a third component of the current coalition *Kulanu* party led by Moshe Kahlon is not bound by this agreement.

In September 2017 two ministers of the Jewish Home party published a proposal to enact an override clause which will empower the *Knesset* to reenact statutes declared void by the Court by a simple majority of all *Knesset* members (61 *Knesset* members). In April 2018, as a result of the asylum seekers crisis, the *Likud* and the Jewish Home party drafted a proposal to enact an override clause which was submitted to the government and was approved by it. The chair of the Jewish Home and the Minister of Education Mr. Naftali Bennett and the Minister of Justice Ms. Ayelet Shaked declared after the vote that the proposed override clause will strengthen the Israeli democracy. Yet the chair of the *Kulanu* party Mr. Moshe Kahlon expressed his firm opposition to the override clause. To resolve the deadlock some politicians proposed that the majority required to reenact a statutes declared void by the Court would be larger (e.g., seventy or seventy five). Yet the Jewish Home members of the coalition rejected this compromise.

The proposal for an override clause has been criticized by the opposition as well as by numerous non-governmental organizations and prominent lawyers. In an unprecedented declaration the President of the Supreme Court Ms. Esther Hayut denounced the override clause and warned that it will leave basic human rights unprotected. The Attorney General also expressed his dissatisfaction with the proposal. 47 prominent legal academics signed a petition condemning the proposal; former and current deans of law schools have also signed a similar petition. The Israeli bar has been silent but a large group of prominent lawyers published an ad in *Haaretz* expressing their opposition to the proposal. An influential think tank – The Israeli Democracy Institute – published several announcements condemning the initiative. Last, Alan Dershowitz – a prominent US lawyer who has closed ties with the Israeli establishment – warned that it will be tragic if the override clause is enacted. The proposal has been supported primarily by right-wing organizations. The rightwing think tank *Kohelet* Policy Forum expressed its support for the initiative, and so did the movement for Governability and Democracy.

The Pros and Cons of an Override

The advocates of the override clause raise both formal and substantive arguments in its favor. Formally they argue that the enactment of the basic laws in 1992 was not characteristic of the enactment of foundational constitutional provisions. No referendum has been conducted; no public debate has preceded their enactment, and they were enacted by a simple majority of the *Knesset* members present in the vote. Further it is claimed that the Israeli courts have been too aggressive and activist. Hence the frequent accusation that Israel is governed by a court rather than by its legislature. Under the view of the advocates of the override clause, the activism of the Court undermines governability and frustrates the democratic foundations of the nation. Some proponents of the override clause adopt the Canadian metaphor of a 'dialogue' between the legislative and the judicial branch and argue that such a dialogue provides a fertile ground for public deliberation. Last proponents of the override clause point to foreign legal systems that adopted the override clause or similar provisions, in particular Canada and Britain.

Opponents point out that the override clause will endanger the protection of rights in Israel and will undermine the proper balance among the branches of government. They point out two major reasons why comparisons with foreign systems are irrelevant: the distinctive

institutional structure of Israel and the uniqueness of its cultural context. With respect to the former it is claimed that passing legislation in Israel is particularly easy. Israel has only one house of Parliament, and typically the government has a majority in the *Knesset*. Hence in practice a majority of 61 members (required under the proposal to reenact a statute) practically grants power to the government to enact anything it wishes to. Israel is also not a member of the European Union and is not subject to its human rights treaties or, for that matter, is not subject to the jurisdiction of any international human rights court.

In addition opponents of the override clause point out that the protection of rights in Israel is precarious due to specific cultural and contextual reasons. The permanent concerns of security, the prominence of religion in Israel, the lack of stable democratic traditions and the persistent tensions among different ethnic and religious communities threaten the stability of Israeli democracy. Under such circumstances undermining the powers of the courts is far more dangerous in Israel than in other western democracies.

Further, one should recall that the override clause is only one of many proposals that are designed to weaken the power of dissent and strengthen the powers of government in Israel. Among such proposals one should mention the proposal to weaken activist NGO's by restricting foreign funding; the Jewish State Bill which is designed to emphasize the Jewish character of the state at the expense of rights of minorities and numerous other proposals. While none of these proposals in itself can undermine the Israeli democracy the accumulation of such proposals poses a critical threat to the robustness of the protection of rights in Israel. It is the popularity of such proposals and the competition among different members of the *Knesset* to raise even more extreme proposals that is particularly worrisome for liberals in Israel.

References [±]

1. ↑ The full text of all Israeli basic laws can be found [here](#)
2. ↑ Note however that this Basic Law does not protect (or at least does not explicitly protects) some rights which are almost universally protected in bills of rights such as freedom of expression, freedom of religion, equality etc.

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